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**AMERICAN BAR ASSOCIATION
SECTION OF
LABOR AND EMPLOYMENT LAW
60TH ANNIVERSARY CELEBRATION
OF THE
NATIONAL LABOR RELATIONS ACT**

"THE NLRB AT THE CROSSROADS -- NLRB SIXTIETH ANNIVERSARY"

Delivered by:

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Chairman
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**May 18, 1995
Luncheon Address
The Mayflower Hotel
Washington, DC**

The two thousand women and men of the National Labor Relations Board are proud to celebrate the sixtieth anniversary of our Agency. On this occasion we are renewing our pledge to strengthen the NLRB's reputation for impartiality, integrity and efficiency in carrying out the mandate of the National Labor Relations Act to protect the right of employees to organize, without interference, and bargain collectively with employers over wages, hours and working conditions.

Our Agency was born during the dark days of the Great Depression when many feared for the very survival of our democratic, free enterprise system. The industrial revolution had transformed a society composed almost exclusively of self-employed farmers and small businessmen into one where more and more people worked in factories and lived in big cities. Instead of working independently at their own pace on farms, they worked at the pace dictated by their boss, by the time-study man or by the assembly line. They worked in huge factories and mills epitomized by Henry Ford's River Rouge complex which employed more than 100,000 on one site. Millions migrated from a relatively self-sufficient life on the farms and in the small towns of the South and Midwest to the Detroit, Cleveland, Pittsburgh and Chicago, the great industrial centers of the Midwest. Along with high wages these jobs brought many new problems.

Few public or private mechanisms were available to deal with job insecurity from layoffs due to economic fluctuations, arbitrary treatment in the workplace, unjust dismissals, injury or illness. In 1927 Henry Ford shut down his Rouge and Highland Park plants and laid off 60,000 of his workers for a year while he retooled for the Model A. The laid off workers had no contractual right to be recalled when production resumed, and there was no adequate safety net, public or private, for them and their families. Slightly less than three decades later, Ford and the UAW negotiated a revolutionary SUB fund which provided income security for auto workers during periods of temporary layoff. Grievance arbitration, a no-strike clause, health care, life insurance, pensions, paid holidays and vacations, all for the most part overlooked by employers in the absence of collective bargaining, had come earlier on the bargaining agenda.

Thus, once the new production system had drawn the workers from the farms and small towns and grouped them together in factories, conditions were ripe for unionization, and some believed even for revolution. These are the conditions that gave rise to our system of free collective bargaining between independent unions and employers, with a minimum of government involvement, over wages, hours and working conditions. It has proved to be a workable mechanism for making the diverse adjustments required by our nation's transformation from an agrarian to an industrial, to a space or information age society. Our Agency, along with our stakeholders in industry and unions, is the custodian of this system that is a foundation of our democratic, free enterprise system.

Before continuing any further, I want to acknowledge my debt in preparing some of my remarks relating to past Chairmen to the works of Professor James Gross of the Cornell ILR school. His two books, *The Making of the National Labor Relations Board* and *The Reshaping of the National Labor Relations Board*, are "Bibles" so far as the NLRB history is concerned. A third volume on the modern NLRB is coming out later this year on the more recent period of our history.

The NLRB was formed when it became clear to Senator Robert S. Wagner and President Franklin D. Roosevelt that a mechanism was needed to bring some order to the developing chaos as AFL and CIO unions competed to represent workers in the auto, steel and rubber industries against the resistance of employers. There was also a clear need for ground rules for the conduct of negotiations once unions were recognized by employers. These necessities led to the passage and signing of the Wagner Act on July 5, 1935. The Act was challenged in the courts and thus in the first two years of the statute's existence, the Board was hardly able to function at all. On April 12, 1937, five test cases were ruled constitutional by the U.S. Supreme Court. These landmark decisions assured at least the immediate future of the fledgling NLRB.

Twice on earlier occasions the old National Labor Relations Board had successfully avoided another pitfall when Secretary of Labor Frances Perkins sought to take the NLRB under her wing and make the Agency a bureau of the Department of Labor. Two of the three Board members at the time, Harry Millis and Edwin Smith, threatened to resign over the issue of maintaining the independence of the NLRB because, in their words, "The Board needed to keep free of arrangements that would inevitably tend to conform the policies of the NLRB to the policies of the particular administration in power."

As pre-Wagner Act NLRB Chairman Francis Biddle stated in hearings on the Wagner Act, "The value and success of any quasi-judicial Board dealing with labor relations lies first and foremost in its independence and impartiality. After all, although the bill deals with the rights of labor, for the success of the machinery contemplated by the act it must in the long run have the confidence of industry and of the public at large. In our view it is in derogation of such independence and impartiality to attach the Board to any department in the executive branch of the government, and particularly to a department whose function in fact in the public view is to look after the interests of labor."

It is appropriate that we note these wise words on the sixtieth anniversary of the NLRB. As you know, I am of the view that -- when labor law reform proceeds at some point down the road -- that policy can be more effectively implemented if Board Members are limited to one term (perhaps a longer term of 7 or 8 years or more). In that way, the best people may be encouraged to do the best job.

The first Chairman of our National Labor Relations Board was J. Warren Madden. When Madden came to the Board in 1935 he was an unknown quantity and was referred to by the Washington staff in jest as "the name pulled out of a hat." He was a professor of torts and property at University of Pittsburgh Law School. He was recommended for the job by pre-Wagner Act Chairman Lloyd Garrison whom he had come to know while both were visiting professors during the summer of 1933 at Stanford Law School. When he told Frances Perkins that he didn't know anything about labor law or the National Labor Relations Act, she replied "Well, that's fine. You won't have any preconceptions about it, and you can just start from the ground up and learn it as you go." (Page 151, *The Making of the National Labor Relations Board*, James Gross.)

I don't recall that anyone in the Clinton Administration or the Congress made that comment about me as my nomination went forward in 1993 and 1994.

Madden faced several challenges during his five-year term. The most important, of course, was developing and implementing a strategy for dealing with legal challenges to the constitutionality of the Wagner Act. A principal element of Madden's plan for this was to establish greater centralization of authority in the Washington headquarters of the NLRB. For example, the Board adopted a rule requiring regional offices to obtain Washington approval before issuing a complaint in any case. The Board also instructed the Regional Directors not to attempt mediation or conciliation without authorization from Washington. A Regional Attorney was assigned by the Board to each regional office to advise the Regional Director. As you might imagine, these moves were greeted with little enthusiasm by staffers in the field.

Madden's greater central control of NLRB activities was part of a strategy to carefully select five test cases to take to the Supreme Court to establish the constitutionality of the National Labor Relations Act. Madden obtained special permission from the Attorney General to argue before the Supreme Court the most important of the five, the Jones and Laughlin Steel case, on the applicability of the interstate commerce clause. On April 12, 1937, jubilation reigned at the Board and throughout the Roosevelt Administration when the Supreme Court's five to four decision was announced.

In retrospect this turned out to be the high point of the Madden Chairmanship. Criticism of the Madden Board, both from the AFL for favoring the CIO and from employers for favoring labor and by Congressmen of varied stripes continued for the remainder of Madden's term, leading to Frances Perkins' decision that a new broom in the huge form of Harry A. Millis was required at the NLRB.

Harry Millis was a giant of a man, both physically and intellectually. He was six-four and weighed 300 pounds. He was sixty-seven when he was appointed Chairman in 1940 -- the oldest of any Chairman during these past sixty years -- but

he brought to the Board considerable energy. Millis was an academic, a professor of economics from the University of Chicago. And he had been a member of the old National Labor Relations Board.

Millis was not a lawyer but he brought to the Chairmanship broad knowledge and practical accomplishment as a labor economist, teacher, author, arbitrator and impartial neutral and public servant. He had served as Chairman of the Chicago Men's Clothing Industry Board of Arbitration and briefly as the first Umpire under the UAW-General Motors National Agreement; he was Chairman of the Economics Department at University of Chicago where he was a mentor to Senator Paul Douglas and co-authored a landmark three-volume work on labor economics and collective bargaining. And, like Madden, he had taught briefly at Stanford.

Millis and Member William Leiserson quickly made major changes in the NLRB's organizational structure, its personnel, its policies and its methods of operation. Millis restored authority to the Regional Directors. Given Millis' background as an impartial neutral, the new Board tended to take into account the concerns of both sides to a greater extent than its predecessor. In *The Reshaping of the National Labor Relations Board*, James Gross concluded that "Many other Board decisions also evidenced the trend toward a more conservative labor policy concerned with employer rights and more lenient with employer actions . . . Millis and Leiserson moved in other cases to establish union responsibility and to deny statutory protection to certain actions of unions under the Act long before union unfair labor practices were added to the law."

The White House was pleased by Millis' more centrist policies and, to support that approach, did not reappoint Member Edwin Smith when his term expired in 1941. Perkins ignored Millis' suggestions for a replacement which included George Taylor, Wayne Morse and Edwin Witte. Instead she appointed her solicitor at the Labor Department, Gerard Reilly. The AFL's boast was that "the elimination of Edwin S. Smith is the crowning achievement in the long campaign to rid the NLRB of favoritism to the CIO". (James Gross in *The Reshaping of the National Labor Relations Board*.) This, however proved to be a Pyrrhic victory for labor because Reilly's conservative ideology became quickly apparent, and after his term on the Board he wrote many of his views into the Taft-Hartley Act as chief draftsman for Senator Taft.

In 1945 Harry Millis resigned at age 71 shortly before the end of his term as Chairman. He was replaced by President Harry Truman's appointee, 38-year-old Paul Herzog. Herzog had devoted his entire career up to then to public service in the field of labor-management relations. At age 26 he had been appointed and served for two years as secretary of Senator Wagner's National Labor Board; in 1937 he was appointed to the New York State Labor Relations Board and

subsequently served as Chairman of that Board until 1944 when he enlisted in the Navy where he served as liaison between the Navy Department and the NLRB.

Again, according to Gross: "Herzog criticized the predecessor Boards, not for enforcing the rights of labor, but for being too self-righteous while doing so: Not only telling the employers they were wrong . . . but telling [them] they were immoral. Herzog took that kind of language . . . out of the Board's decisions."

Herzog paid a lot more attention to press relations than had Madden and Millis who he felt "didn't give a damn about what the press said." To Herzog public relations were "utterly essential." Herzog "worked diligently to improve the Board's relations with the Washington press corps and with Congress." (Gross, page 247.)

Herzog's sensitivity to public relations carried over into the Board's decisions. He was always conscious of the reaction to the Board's decisions in the labor and business communities.

The Herzog Board gradually expanded employers' right to expression, abandoning the 1930s hands-off neutrality policy. Under Herzog's leadership the Board also placed restrictions on employees' and unions' conduct in representation election campaigns. The Herzog Board also held that employers could discharge wildcat strikers. But it was under Chairman Herzog that the Board first formulated the doctrine that unions have a right to reply to captive audience speeches -- a position soon repudiated by the Eisenhower Board which followed him.

Prior to the Taft-Hartley amendments Chairman Herzog stated that the statute required some changes and he advised President Truman about the Taft-Hartley bill. As Professor Gross has noted, Chairman Herzog sent private memoranda to President Truman explaining the Board's objections to certain provisions in the legislation pending before Congress at that time. Chairman Herzog expressed the Board's views on labor law reform to Congress as well.

Indeed, Chairman Millis, during his term, had written President Roosevelt that the "Wagner Act is not a complete labor code. In the long run it will need to be amended in the light of experience." As you know, that has been and remains my view about the labor law as it is written in 1995.

My remarks here today have focused upon the first three Chairmen of the Board -- all of whom contributed to its shape and direction at a relatively embryonic stage of the Agency's development. However, because I came to work for Chairman Frank McCulloch in 1963 -- two years after he was first appointed by President John Kennedy -- I would like to mention him as well. Chairman McCulloch is someone that I know and admire greatly -- as do all of his associates at the Agency.

I still possess a letter that he sent me, when I was an undergraduate student beginning to develop an interest in industrial relations, about the impact of the Taft-Hartley amendments on federal labor policy.

When President Kennedy appointed Frank McCulloch Chairman of the NLRB in 1961 he had been serving as Chief Assistant to Senator Paul Douglas of Illinois, having come to Washington with Douglas when he was elected to the Senate in 1948. He was regarded as one of the most capable and influential administrative assistants on Capitol Hill. This assessment is confirmed by the unanimous Senate vote confirming McCulloch's appointment.

Before going to Washington with Paul Douglas, McCulloch had been a public member of the Regional War Labor Board, labor education director at Roosevelt College in Chicago and had taught at Chicago Theological Seminary and Pacific School of Religion in San Francisco. After graduating from Harvard Law School he practiced law in Chicago for six years and was active in church and social work there.

Commenting on his appointment the *New York Post* said that McCulloch will bring to the NLRB "a lively mind, a humane spirit and a passion for justice and decency . . . the kind of spirited intelligence that transcends all doctrinal lines." (*New York Post*, February 6, 1961.)

Under McCulloch's leadership the Board moved quickly to reverse several of its predecessor's policies, increasing restrictions on employer speech, obligating management to bargain about decisions to contract out work, and reducing restrictions on union organizing activities including organizational picketing. The McCulloch Board also changed rules for determining appropriate bargaining units to make the protections of the Act more accessible to employees who wished to be represented by unions.

Professor Gross's judgment was that "The McCulloch Board came as close to a full and effective implementation of a national labor policy encouraging unionization and collective bargaining as the Wagner Act Board chaired by Warren Madden did in the two years after the Supreme court ruled the law constitutional." (James Gross's unpublished manuscript for book to be titled *Promise: The Subversion of U. S. Labor Relations Policy, 1947-1994*, Temple University Press.) These and other changes by the McCulloch brought immediate and strong employer opposition.

Another fact of history noteworthy on our anniversary is that the National Labor Relations Board was among the first significant employers of women attorneys. In 1939 twelve out of ninety-one of the Board's review attorneys were women. That early tradition has continued to this day when, at latest count, forty-four per cent of NLRB attorneys are women. And our Agency has had a number of

women Regional Directors, Board Members, one woman General Counsel and one woman Chairman.

We have not done nearly as well with the employment of minorities. My able and sagacious Chief Counsel, William R. Stewart, is the first black lawyer to hold that position with any Board Member in the Agency's entire sixty year history! In the coming years we can and must do better in employing greater numbers of qualified minority and women lawyers.

On the occasion of our Agency's sixtieth anniversary it is timely to assess the vitality of our organization and the effectiveness with which our processes meet the needs and expectations of our stakeholders and the broader society in which we live.

We have been actively engaged in a process of reassessment and renewal for the past year, and we have made several changes that we believe will make the Agency more responsive to the needs and expectations of workers, unions and employers. Our efforts are designed to accomplish several objectives including increased emphasis on voluntary compliance, informal methods of dispute resolution, promotion of greater labor-management cooperation and employee involvement, less litigation, elimination of unnecessary delays in our processes, and quicker action against employers and unions whose conduct threatens irreparably to undermine the purpose of the National Labor Relations Act.

Some of the steps that have already been taken in our renewal efforts include the appointment of union and employer advisory panels composed of fifty distinguished labor lawyers twenty-five of whom represent employers and twenty-five who represent unions. These panels meet twice a year to give the Board and General Counsel their viewpoints on various issues and actions under consideration by the Board. Our consultations with these stakeholder panels provide us with an independent assessment of the needs of our constituents and practical comments and suggestions on our procedures and performance.

On February 1 of this year we embarked on a one-year trial period for several new Administrative Law Judge procedures. Under the new procedures the Chief Administrative Law Judge, in appropriate cases, may appoint a "settlement judge" to work with the parties informally in an effort to reach a settlement, thus avoiding the costs to the parties and the public and the delay required by a formal Administrative Law Judge hearing and possible appeals. If a settlement is not reached informally the case proceeds to a hearing before an Administrative Law Judge other than the settlement judge. Also, in appropriate cases where the parties agree, Administrative Law Judges are encouraged to issue on-the-spot bench decisions. Again, the purpose is to simplify and speed up the process.

The Board is also trying to eliminate unnecessary delays and litigation in union certification election procedures by proposing the adoption of a rule which

will state the conditions when a single facility will be deemed an appropriate bargaining unit and an election ordered. Under current procedures each union election petition for a single unit in a multiple unit employer may be litigated by the parties with delay and needless cost to all including the taxpayer, even though the circumstances are substantially identical to ones ruled on by the Board many times on previous occasions.

While 60 is either advanced middle age or senior citizen status, we must disenthral ourselves with a sense of renewed dedication and purpose. In today's world of increasing needs and shrinking resources, the Board is taking a look at all possible steps that can be taken to reduce costs without compromising our mission.

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